

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Before the Board of Patent Appeals and Interferences

In re the Application of

Karen M. Slimak

Serial No.: 10/682,546

Filed: October 10, 2003

For: USE OF TROPICAL ROOT CROPS IN EFFECTIVE INTERVENTION STRATEGIES FOR
TREATING DIFFICULT AND COMPLEX CASES AND CHRONIC DISEASES

APPEAL BRIEF

Thomas P. Pavelko
Registration No.: 31,689
NOVAK DRUCE & QUIGG LLP
1300 Eye Street, NW
1000 West Tower
Washington, D.C. 20005
Telephone: (202) 659-0100
Facsimile: (202) 659-0105

Attorney for Appellant

Date: May 28, 2008

(i) REAL PARTY IN INTEREST

The real party in interest is the applicant, Karen M. Slimak, an individual residing in Springfield, Virginia.

(ii) RELATED APPEALS AND INTERFERENCES

There are no known appeals or interferences which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. Applicant does note that parent application Serial No. 09/889,133, has now matured into U.S. Patent 6,632,461.

(ii) STATUS OF CLAIMS

Claims 1, 2, 4-7 and 9-20 are pending in the application. Of the foregoing claims 15 and 16 stand withdrawn from consideration. Claims 3 and 8 are canceled. The rejection as to claims 1, 2, 4-7, 9-14 and 17-20 are the subject matter to the present appeal.

(iv) STATUS OF AMENDMENTS

There has been no amendment filed after final rejection.

(v) SUMMARY OF CLAIMED SUBJECT MATTER

The presently claimed invention is directed to "a method for dietary intervention, said method comprising (a) withholding all food from an animal for at five days, except for tropical root crops; and (b) feeding a concentrated form of tropical root crops to the animal for at least a five day period." (Specification, page 1 below the heading (1) Field of the Invention, first and second sentences). In another embodiment, as set forth in dependent claim 2, the method comprises "isolating the animal from environmental allergens subsequent to said withholding steps" See Specification, the sentence bridges pages 1-2. In an further aspect of the invention as set forth in claim 5, the method further comprises "feeding foods from the same taxonomic family as the tropical root crops once every 7 days following said initial feeding step" (Specification page 2 first sentence in the second full paragraph thereof). In further aspect of the invention as specified in claim 7 the method further comprises feeding the patient an unusual food selected from meat, oil, fats and combinations thereof" which is supported by the same portion of the description of the specification at page 2, first sentence of the second full paragraph thereof.

As to the limitations of dependent claim 10, wherein the tropical root crops are one selected from the recited group of taxonomic families, support can be found in the Table of example 3, on page 51 of

the specification. As to the specific embodiment of claim 12, wherein the tropical roots crops are those of the taxonomic families recited therein, support can found not only in the aforementioned Table of example 3 but also in the Table of example 4, on page 52 of the specification.

Finally in the embodiment of independent claim 20 the method for dietary intervention in a human patient is described in the aforementioned portions on page 1 under the heading (1) Field of the Invention, on page 2 first sentence of the second full paragraph, on page 12 fourth full paragraph, and in the Table in example 3 on page 51, as well as the Table of example 4 on page 52, and the Table of example 5 also on page 52.

(vi) GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The board is requested to review the rejection of claims 1-2, 4-7, 9-14 and 17-20 under 35 USC § 112, first paragraph.

(vii) ARGUMENT

The basis of the examiner's rejection is his mistaken belief that he can view applicant's specification (including the prosecution of the now patented parent application), to formulate a belief as to the subject matter that applicant should claim as the invention and then to proceed to reject that subject matter as not being enabled.

This is evident by reviewing the examiner's commentary beginning at page 2 of the final rejection beginning with "i.e. applicant is enabled for treating the particular conditions and systems recited in claim 1 of Application No. 09/889,133 issued as US Patent No. 6,632,461. Also please note application 10/682,546 [the instant application] being a divisional of parent application 09/889,133..."

Applicant respectfully submits that neither the statute (35 USC § 112, first paragraph) nor the courts have ever condoned an approach such as the examiner appears to be making here.

As noted hereinabove in the heading "Summary of Claimed Subject Matter" applicant has provided nearly verbatim support in the specification for the subject matter of the claims on appeal. None of the support recites a method for treating any particular disease or condition. Rather it is a claimed method of dietary invention for animals, including humans. There can be no serious doubt that the claims specify subject matter which is clearly supported and enabled by the original disclosure.

However, what the examiner would like the board to do is to redefine applicant's invention with the examiner's own words i.e., defining a method "of treating particular conditions and symptoms..."

which is not at all the claimed method. Congress has promulgated 35 USC § 112, second paragraph to leave it solely to applicants to define their inventions. Moreover, the courts have previously chastised examiners for attempting to recast the disclosure to the examiner's view of the subject matter of the invention, rather than leaving the subject matter to be defined as the invention to the exclusive realm of the applicant, as contemplated by Congress in drafting the statute. 35 USC § 112, second paragraph specifically recites "the specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention". (emphasis added).

The courts have condemned examiners for attempting to vary from this mandated process See, for example, In re Borkowski, 164 USPQ 642, 645 (CCPA 1970) stating:

The examiner's approach to determining whether appellants' claims satisfy the requirements of § 112 appears to have been to study appellants' disclosure, to formulate a conclusion as to what he (the examiner) regards as the broadest invention supported by the disclosure, and then to determine whether appellant's claims are broader than the examiner's conception of what "the invention" is. We cannot agree that § 112 permits of such an approach to claims"

In the instant application, the applicant has cast her claims as a dietary intervention plan by withholding all food for a period of at least 5 days, except for tropical root crops as in claim 1 or in independent claim 20 for tropical root crops and some specific seeds. Neither claim 1 or 20 specifically refers to treating any symptom or condition and the applicant respectfully submits that the examiner has impermissibly exceeded his authority to recast applicant's invention as a method for treating certain diseases, symptoms or conditions, when the applicant's does not claim such a method. Applicant respectfully submits that not only does the examiner impermissibly go beyond what the Congress and the courts have specified as the limit to his authority in examination but he merely sets up a straw man argument that if applicant was indeed claiming treatment of certain diseases, symptoms or conditions only some (such as those in allowed parent application 09/889,133) would be enabled while others would not. As applicant is not claiming those (other) diseases, symptoms or conditions or a method treatment thereof, the examiner's entire protocol in setting up the straw man argument should be rejected and the application examined to see if enabling disclosure is found for the specified steps of applicant's claims. Review of the examiner's sole ground of rejection of the claims under 35 USC § 112, first paragraph should be soundly rejected and reversed.

(viii). CLAIMS APPENDIX

An appendix containing a copy of the claims involved in the appeal is attached

(ix) EVIDENCE APPENDIX

Not applicable

(x) RELATED PROCEEDING APPENDIX

None

Respectfully submitted,



Thomas P. Pavelko
Registration No. 31,689

Date: May 28, 2008

Thomas P. Pavelko
Registration No.: 31,689
NOVAK DRUCE & QUIGG LLP
1300 Eye Street, NW
1000 West Tower
Washington, D.C. 20005
Telephone: (202) 659-0100
Facsimile: (202) 659-0105
Atty Docket No. 8686.004.USDV00

(viii) APPENDIX: THE CLAIMS ON APPEAL

1. A method for dietary intervention, said method, comprising:
 - (a) withholding all food from an animal for at least 5 days, except for tropical root crops; and
 - (b) feeding a concentrated form of tropical root crops to the animal for at least the five day period.
2. The method of claim 1, further comprising isolating the animal from environmental allergens subsequent to said withholding steps.
4. The method of claim 1, wherein said withholding and feeding steps extend for at least seven days.
5. The method of claim 1, comprising feeding foods from the same taxonomic family as the tropical root crops once every seven days following said initial feeding step.
6. The method of claim 5, comprising introducing unusual foods that the animal has eaten only once or twice in a preceding year period.
7. The method of claim 6, wherein said unusual food is selected from meat, oil, fats, and combinations thereof.
9. The dietary intervention method of claim 1, wherein said withholding also eliminates all supplements except mineral calcium.
10. The method of claim 1, wherein said tropical root crops are at least one selected from the group consisting of Convolvulaceae, Aroid, Euphorbiaceae, Nymphaeaceae, Cyperaceae, Dioscoreaceae and Marantaceae.
11. The method of claim 10, wherein the tropical root crop is selected so as to be fed in rotation only once in seven days.

12. The method of claim 1, wherein said tropical root crops are at least one selected from the group consisting of Convolvulaceae, Aroid, Euphorbiaceae, Nymphaeaceae, Cyperaceae, Dioscoreaceae, Marantaceae, Alismataceae, Cannaceae, Cycadaceae, Asclepiadaceae, Zingiberaceae, Iridaceae, Leguminosae, Muscaceae, Liliaceae, Typhaceae, Urticaceae, Lamiaceae and Cucurbitaceae.
13. The method of claim 1, wherein the animal is a human
14. The method of claim 1, wherein the animal exhibits at least one system or condition selected from the group consisting of anxiety, arthritis, asthma, colic, congestion, diabetes, digestive upsets, irritable bowel syndrome, eczema, fatigue, migraine headaches, multiple sclerosis, seizures and rashes. .
17. The method of claim 1, wherein the steps of withholding and feeding are repeated at least once.
18. The method of claim 1, further comprising isolating the patient from environmental allergens during said withholding and feeding steps.
19. A method of claim 1, wherein the animal exhibits at least one condition or symptom selected from the group consisting of acid reflux, aggression, agitation, allergies, Alzheimer's disease, anxiety, arthritis, Asperger's syndrome, asthma, autism, bed wetting, biochemical imbalance, bizarre behaviors such as sucking on carpet and poking objects down his throat, bloating, Candidiasis, colic, congestion, constipation, cramps, Crohn's disease, dark circles under eyes, deep stuporous sleep, delayed motor skills, delayed social skills, diarrhea, diabetes, digestive upsets, eating disorders, eczema, emotional outbursts, enzyme deficiencies, fatigue, fatty acid imbalance, flushed face, food allergies, sensitivities, and intolerances, food-related problems, frequent ear infections, gas, headaches, head hanging, hyperactivity, hypersensitivity to sensory stimuli such as noise, motion, light, touch, smell, commotion, and the like, hypotonic muscle tone, infantile spasms, insomnia, irritability, irritable bowel syndrome, irritated and injured mucous membranes of the GI tract, irritation and inflammation of mucosal linings, itching, leaking gut, lethargy, licking moldy areas, loose and bloody stools, loss of muscle tone, malabsorption, migraine headaches, multiple chemical sensitivities, multiple sclerosis, muscle aches, muscle stiffness, muscle weakness, muscle spasms, muscle tension, nausea, noise sensitivity, non-verbal autistic child, nutritional deficiencies, obsessive compulsive behaviors, obsessive compulsive disorders, other digestive conditions, outbursts of bawling, pain, panic attacks, paleness, post nasal drip, PDD, puffiness under eyes, rages, red, hot feet, repeated infections of various kinds, screaming fits, seizures, self abuse. self-

stimulating behaviors, sensory sensitivities, severe neurological effects and disorders, severely underweight, sleeping difficulties, shortness of breath, socially unresponsive, stomach aches, swelling, swollen and irritated mucous membranes, tantrums, temporary blindness, trance-like, dazed state, ulcerative colitis, uncontrollable anger, variety of malabsorption problems, various rashes, violence, violent behaviors, violent rages, vomiting, wide variety of emotions, withdrawn, and zoned out in animals, including humans, comprising:

(a) withholding all food from a patient for at least five days, except for tropical root crops; and

(b) feeding a concentrated form of tropical root crops to the patient for at least the five day period.

20. A method for dietary intervention in a human patient comprising:

a. withholding all food from the patient for at least five days, except for specified crops; and

b. feeding a concentrated form of said specified crops to the patient for at least the five day period;

c. wherein the specified crops are selected from the group consisting of white sweet potatoes, cassava, edible aroids, amaranth, true yams, malanga, lotus, quinoa, buckwheat, arrowroot and water chestnut.

- (ix) EVIDENCE APPENDIX
Not applicable

(x) RELATED PROCEEDING APPENDIX
None